

This Opinion is Not a
Precedent of the TTAB

Mailed: January 27, 2023

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re B-K Lighting, Inc.
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Serial No. 88769422
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Jaye G. Heybl of Ferguson Case Orr Paterson LLP,
For B-K Lighting, Inc.

Hai-Ly Lam, Trademark Examining Attorney, Law Office 119,
Brett J. Golden, Managing Attorney.

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Before Cataldo, Shaw and Lynch,
Administrative Trademark Judges.

Opinion by Shaw, Administrative Trademark Judge:

B-K Lighting, Inc. (“Applicant”) seeks registration on the Principal Register of the standard character mark AGI2 for goods identified as “Lighting fixtures,” in International Class 11.¹

¹ Application Serial No. 88769422 was filed on January 22, 2020, under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), alleging bona fide intention to use the mark in commerce.

The Trademark Examining Attorney refused registration of Applicant's mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground of a likelihood of confusion with the previously-registered and separately-owned marks:



for, inter alia, goods identified as:

Elements of architectural signage, namely, backlit, digital, electrical, mechanical, luminous, and neon components of signs, namely, lights for use in illuminating signs and displays, LED lighting assemblies for illuminated signs, LED light assemblies for buildings and other architectural uses, and tools, components and supplies for use in making signs, namely, fluorescent, HID, LED and incandescent bulbs, lamps and fixtures, in International Class 11;² and



for goods identified as:

Retail store services in the field of grip and lighting equipment for the film industry, in International Class 35, and

Manufacture of grip and lighting equipment for the motion picture, still and television industries to the order and specification of others, in International Class 40.³

When the refusal was made final, Applicant appealed and requested reconsideration. The Examining Attorney denied the request for reconsideration, and

² Registration No. 6008383, issued March 10, 2020. The description of that mark states: "The mark consists of the letters 'AGI' with a drawing of two three-dimensional cubes to the upper right of the letters, one cube nested inside the other, and a dual chevron device projecting from the upper right of the nested cubes."

³ Registration No. 6037918, issued April 21, 2020. "GRIP .COM" is disclaimed.

the appeal resumed. The Applicant and Examining Attorney filed briefs. We affirm the refusal to register.

I. Likelihood of confusion

Our determination of the issue of likelihood of confusion is based on an analysis of all the probative facts in evidence relevant to the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973) (“*DuPont*”). See also *In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). We must consider each *DuPont* factor for which there is evidence and argument. See *In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019). In any likelihood of confusion analysis, two key considerations are the relatedness of the goods and services and the similarities between the marks. See *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) (“The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods [and services] and differences in the marks.”).

Because the mark and the identified goods in Registration No. 6008383 are most similar to Applicant’s mark and goods, for the sake of judicial economy, we focus our analysis on the mark in this registration. If confusion is likely between Applicant’s mark and the mark in this registration, there is no need for us to consider the likelihood of confusion with the other cited mark. See, e.g., *In re Max Capital Grp. Ltd.*, 93 USPQ2d 1243, 1245 (TTAB 2010).

A. The nature and relatedness of the goods, the established, likely-to-continue trade channels, and the classes of purchasers

We begin with the relatedness of the respective goods. “[I]t is sufficient for finding a likelihood of confusion if relatedness is established for any item encompassed by the identification of goods within a particular class in the application.” *In re Aquamar, Inc.*, 115 USPQ2d 1122, 1126 n.5 (TTAB 2015).

Applicant’s goods are “lighting fixtures.” Registrant’s goods include “Elements of architectural signage, namely, . . . lights for use in illuminating signs and displays, LED lighting assemblies for illuminated signs, . . . and tools, components and supplies for use in making signs, namely, fluorescent, HID, LED and incandescent bulbs, lamps and fixtures.” Applicant’s and Registrant’s goods are in part legally identical inasmuch as Applicant’s broadly worded “lighting fixtures” encompasses all types of lighting fixtures including Registrant’s more narrowly identified lights, lighting assemblies, and light fixtures for architectural signage. *See In re Hughes Furniture Indus., Inc.*, 114 USPQ2d 1134, 1137 (TTAB 2015) (Applicant’s broadly worded identification of goods necessarily encompasses Registrant’s narrowly identified goods).

Applicant argues that the goods are nevertheless dissimilar because they are sold to different consumers for different purposes: “[u]nlike Registrant’s goods, Applicant’s goods are directed exclusively to consumers and contractors who are looking for light

fixtures for residential and commercial properties. By comparison, Registrant's goods are sold to businesses that need signs[.]”⁴ This argument is unpersuasive.

We must consider Applicant's goods as they are described in the application which, as noted above, contain no limitation as to purpose, targeted consumer, or channel of trade. *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014); *Octocom Sys, Inc. v. Houston Comput. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990) (“The authority is legion that the question of registrability of an applicant's mark must be decided on the basis of the identification of goods set forth in the application regardless of what the record may reveal as to the particular nature of an applicant's goods, the particular channels of trade or the class of purchasers to which the sales of goods are directed.”); *Paula Payne Prods. v. Johnson Publ'g Co.*, 473 F.2d 901, 177 USPQ 76, 77 (CCPA 1973) (“Trademark cases involving the issue of likelihood of confusion must be decided on the basis of the respective descriptions of goods”).

Furthermore, because the goods are without restriction, we must presume that they are sold in all normal trade channels and to all normal classes of purchasers for such goods. *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1906 (Fed. Cir. 2012). Thus, given that Applicant's goods are legally identical in part to Registrant's, we consider Applicant's and Registrant's trade channels and classes of purchasers to overlap. *In re Yawata Iron & Steel Co.*, 403 F.2d 752, 159 USPQ 721, 723 (CCPA

⁴ Applicant's Br., p. 5, 12 TTABVue 5.

1968) (where there are legally identical goods, the channels of trade and classes of purchasers are considered to be the same).

The *DuPont* factors regarding the relatedness of the goods, channels of trade, and classes of purchasers strongly favor a finding of a likelihood of confusion.

B. The similarity or dissimilarity of the marks

We next consider and compare the appearance, sound, connotation and commercial impression of the marks in their entireties. *Palm Bay Imps. Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005). The proper test regarding similarity “is not a side-by-side comparison of the marks, but instead whether the marks are sufficiently similar in terms of their commercial impression such that persons who encounter the marks would be likely to assume a connection between the parties.” *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1801 (Fed. Cir. 2018) (quoting *Coach Servs. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012) (internal quotation marks and citation omitted)). “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *In re Inn at St. John’s*, 126 USPQ2d 1742, 1746 (TTAB 2018), *aff’d mem.*, 777 F. App’x 516 (Fed. Cir. 2019), (quoting *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014)).

The in part legally-identical nature of Applicant’s and Registrant’s goods reduces the degree of similarity between the marks that is necessary for confusion to be likely. *See Viterra*, 101 USPQ2d at 1912.

Applicant’s mark is simply AGI2 in standard characters. The registered mark is AGI in stylized form with a design featuring “two three-dimensional cubes.”



. Both marks are similar in appearance, sound, connotation and commercial impression because they share the dominant term AGI.

AGI is the dominant portion of Registrant's mark because it comes first in the mark and forms the entirety of the word portion of the mark. In the case of composite marks, such as Registrant's, the words are normally accorded greater weight than the design because they are likely to make a greater impression upon purchasers, to be remembered by them, and to be used by them to request the goods. This is because the word portion of a word and design mark likely will appear alone when used in text and will be spoken when requested by consumers. *In re Aquitaine Wine USA, LLC*, 126 USPQ2d 1181, 1184 (TTAB 2018). Nothing about the geometric design in this cited mark creates enough of an impression that we would deviate from this general rule. Accordingly, we find that the design element of Registrant's mark is not nearly as significant as the literal element AGI.

AGI also is the dominant portion of Registrant's mark because it comes first in the mark. "It is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered." *Id.* at 1185 (quoting *Presto Prods. Inc. v. Nice-Pak Prods., Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988)).

In Applicant's mark, the term AGI is the dominant portion because it forms the first part of the wording AGI2. The addition of the number "2" in Applicant's mark does little to create a different appearance, sound, connotation and commercial impression because it suggests that the AGI2 lighting fixtures will be a newer or

second version of some previous version of the goods. Likelihood of confusion is not necessarily avoided between otherwise confusingly similar marks merely by adding or deleting other distinctive matter; if the dominant portion of both marks is the same, then the marks may be confusingly similar notwithstanding peripheral differences. *See, e.g., In re Detroit Athletic Co.*, 903 F.3d 1297, 1304, 128 USPQ2d 1047, 1049 (Fed. Cir. 2018) (affirming the Board's finding that the marks DETROIT ATHLETIC CO. and DETROIT ATHLETIC CLUB are nearly identical in terms of sound, appearance and commercial impression, and noting that, while "the words 'Co.' and 'Club' technically differentiate the marks, those words do little to alleviate the confusion that is likely to ensue"); *Stone Lion Cap. Partners*, 110 USPQ2d at 1161 (affirming the Board's finding that applicant's mark STONE LION CAPITAL incorporated the entirety of the registered marks LION CAPITAL and LION, and that the noun LION was the dominant part of both parties' marks).

We find further that Applicant's mark encompasses the entirety of the word portion of Registrant's mark. "Likelihood of confusion often has been found where the entirety of one mark is incorporated within another." *Hunter Indus., Inc. v. The Toro Co.*, 110 USPQ2d 1651, 1660 (TTAB 2014) (applicant's PRECISION mark incorporated in opposer's PRECISION DISTRIBUTION CONTROL mark) (citing, inter alia, *In re Mighty Leaf Tea*, 601 F.3d 1342, 94 USPQ2d 1257, 1257 (Fed. Cir. 2010) (applicant's mark ML is similar to registrant's mark ML MARK LEES, both for skin care products).

When we consider the marks in their entirety, we find that Applicant's mark,

AGI2, and Registrant's mark, , are similar in sound, connotation and commercial impression. The marks are similar in appearance as well because Applicant's mark is displayed in standard character form, and is not limited to any special stylization. We must assume that it could be displayed in a font style that is similar to Applicant's mark. *See* Trademark Rule 2.52(a), 37 C.F.R. § 2.52(a) ("Standard character" marks are registered "without claim to any particular font style, size, or color."); *see also* *Viterra*, 101 USPQ2d at 1909; *Squirtco v. Tomy Corp.*, 697 F.2d 1038, 216 USPQ 937, 939 (Fed. Cir. 1983) ("[T]he argument concerning a difference in type style is not viable where one party asserts rights in no particular display").

In sum, we find that the marks are similar in appearance, sound, connotation and commercial impression. This *DuPont* factor favors a finding of likelihood of confusion.

C. Consumer sophistication

The fourth *DuPont* factor involves "[t]he conditions under which and buyers to whom sales are made, i.e., impulse vs. careful, sophisticated purchasing." *DuPont*, 177 USPQ at 567. Applicant argues that confusion is unlikely because of the degree of care exercised by relevant consumers:

[N]either Appellant's nor Registrants' goods are subject to impulse purchasing and to the contrary, Appellant's customers are sophisticated and careful. That is, consumers of lighting fixtures typically carefully investigate such goods before purchasing the goods. The nature of Appellant's goods clearly require selection with

care and deliberation after significant investigation. Purchasers of Appellant's and Registrants goods are likely to exercise one of the highest standards of care when making purchasing.⁵

In response, the Examining Attorney argues that

[T]he fact that purchasers are sophisticated or knowledgeable in a particular field does not necessarily mean that they are sophisticated or knowledgeable in the field of trademarks or immune from source confusion. . . . The identity of the marks and the relatedness of the goods and/or services "outweigh any presumed sophisticated purchasing decision." Citing *In re i.am.symbolic, llc*, 116 USPQ2d 1406, 1413 (TTAB 2015), *aff'd*, 866 F.3d 1315, 123 USPQ2d 1744 (Fed. Cir. 2017).⁶

On this point, we agree with the Examining Attorney. Applicant's argument regarding sophisticated consumers and careful purchasing conditions does not overcome the key facts of this appeal—that the marks are similar and the respective goods are in part identical.

However, we do not find that the record supports a finding that Applicant's consumers are sophisticated. There is no evidence on this point, and Applicant has not filed an affidavit of use indicating that its mark is in use on the identified goods. Further, with no restrictions on the types of consumers for Applicant's goods, they are deemed to include both lighting professionals as well as ordinary members of the public, including unsophisticated do-it-yourself homeowners seeking to install new lights. *See Sock It to Me, Inc. v. Fan*, 2020 USPQ2d 10611, at *7-8 (TTAB 2020). "Board precedent requires our decision to be based on the least sophisticated

⁵ Applicant's Br., p. 5, 12 TTABVUE 5.

⁶ Examining Attorney's Br., p. 25, 14 TTABVUE 25.

potential purchasers.” *In re FCA US LLC*, 126 USPQ2d 1214, 1222 (TTAB 2018) (citing *Stone Lion*, 110 USPQ2d at 1163). In sum, we find there is nothing in the record to show that the least sophisticated purchasers of Applicant’s goods would exercise anything more than ordinary care.

We note that Registrant’s goods, by their nature, may be directed to more sophisticated consumers. But this alone does not ensure that Registrant’s consumers also will exercise greater than ordinary care and avoid being confused upon encountering Applicant’s goods which are not specialized or directed to a sophisticated consumer. Rather, on the record before us, we think it likely that consumers of Registrant’s goods, upon encountering Applicant’s goods, will think they are a more general line of lighting fixtures directed to a broader market.

This *DuPont* factor is neutral.

D. Conclusion

The similarity of the marks for in part identical goods, which move in the same channels of trade to the same classes of customers renders confusion likely. The first, second, and third *DuPont* factors support a finding of likelihood of confusion.

The fourth *DuPont* factor regarding consumer sophistication is neutral. However, even if this factor weighed against confusion, the fact “[t]hat the relevant class of buyers may exercise care does not necessarily impose on that class the responsibility of distinguishing between similar trademarks for similar [goods]. ‘Human memories even of discriminating purchasers . . . are not infallible.’” *In re Research and Trading Corp.*, 793 F.2d 1276, 230 USPQ 49, 50 (Fed. Cir. 1986) (quoting *Carlisle Chem. Works, Inc. v. Hardman & Holden Ltd.*, 434 F.2d 1403, 168 USPQ 110, 112 (CCPA

1970)). The “[s]ophistication of buyers and purchaser care are relevant considerations but are not controlling on this factual record.” *Id.*

We find the record establishes that consumers who are familiar with the goods

identified by the cited **AGI**  mark, who encounter the goods under Applicant’s AGI2 mark, are likely to believe that the goods emanate from a single source.

Decision: The refusal to register Applicant’s mark AGI2 under Section 2(d) of the Trademark Act is affirmed.